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IN THE

Supreme Court of the United States

October Term, 1959.

No. 111.

MAX SCHAFFER and NORMAN SCHAFFER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITIONERS' REPLY BRIEF.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioners.

IRVING W. COLEMAN,
1820 Main Street,
Northampton, Pa.,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

TABLE OF CASES CITED.

	Page
Canella v. United States, 157 F. 2d 470 (C. A. 9, 1946)	9
Griffin v. United States, 272 F. 2d 801	8
Grunewald v. United States, 353 U. S. 391	3, 11
Ingram v. United States, 272 F. 2d 567	7, 8
Regina v. Dawson, C. C. A. (1960), 1 W. L. R. 163	3
Stirone v. United States, 361 U. S. 212	7
United States v. Rosenfeld, 235 F. 2d 544 (C. A. 7), certiorari denied, 352 U. S. 928	4

RULES CITED.

	Page
Federal Rules of Criminal Procedure:	
Rule 8(a)	11
Rule 8(b)	3, 8
Rule 14	7

MISCELLANEOUS.

	Page
136 A. L. R. 943	13

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"The Government continues riding a legal pogo-stick in this case. Only a few days before argument in this Court, in a move that can only be described as an attempt to win a case at any cost, the Government unabashedly repudiated the entire decision of the Court of Appeals. Although that court adopted in toto the arguments made there by the Government, we now are informed by the Government that the lower court was "in error" (Gov't Br. 32). There is at least this consistency to the Government's stance: in the Court of Appeals the Government abandoned the theory of the case which the District Court had taken at the Government's behest. The Government deserves credit for being agile, if not fair.

The Government has come forth with what it advertises as two entirely new theories to sustain the convictions in this case. No explanation is offered for their sudden appearance for the first time in the Supreme Court of the United States. Examination of these new arguments, as we shall see, reveals that they are simply facades to cover over the decision of the Court of Appeals which the Government declines openly to defend.

I.

The first question presented by the petition for certiorari challenged the validity of the joint trial of three defendants,[1] charged with independent and unrelated offenses. In the courts below this mass trial was upheld solely on the ground that the indictment had also contained a conspiracy count bracketing all of the defendants. The Court of Appeals said:

> "Were it not for the conspiracy count, it would have been clearly erroneous to try appellants together under Rule 8(b), Fed. R. Crim. P." (R. 112)

This conspiracy charge was so flimsy, so completely without support in evidence, that the trial court, essentially on its own motion, dismissed the charge after the prosecution had presented its case. Petitioners presented to this Court the question whether such a flimsy and fictional conspiracy allegation could justify their mass trial.

A. The Government has now abandoned the legal position it urged upon the lower courts. Not one paragraph in its brief is devoted to it. The Court of Appeals, we are told, was "in error": the conspiracy count is not an "indispensable nexus" to a mass trial in this case and "has no bearing" on the issue (Gov't Br. 16, 21, 32). The Government thus casually attempts to dismiss from further consideration the primary question which this Court agreed to

1. To simplify the discussion, the two Schaffers are treated as one defendant.

hear. Its refusal to meet the question can only be explained as an admission that the conspiracy allegation cannot be defended as a basis for conducting a mass trial.[2]

B. In place of the abandoned conspiracy theory of joinder, the Government has come up with a brand new argument. Briefly, the Government now contends that, even if there had been no conspiracy charge, the defendants nonetheless would have been properly subjected to a mass trial. The Government does not even attempt to explain why this new theory was not raised or recognized in either court below.

The argument centers, as it must, upon Rule 8(b) of the Federal Rules of Criminal Procedure. This permits joinder of defendants who participated in "the *same* act or transaction or the *same* series of acts or transactions." It is quite obvious that each of the defendants in this case participated in a series of transactions. These series of transactions were *similar*, but they were not the same. Each defendant, separately and without any connection with

2. In *Grunewald v. United States*, 353 U. S. 391, 404, Mr. Justice Harlan wrote: "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." A recent decision of the British Criminal Court of Appeal, *Regina v. Dawson*, C. C. A. (1960), 1 W. L. R. 163, strongly underscores this attitude:

> "With regard to the first count, for conspiracy, we feel that it is desirable to say something more. This court has more than once warned of the dangers of conspiracy counts, especially these long conspiracy counts, which one counsel referred to as a marathon conspiracy count. Several reasons have been given. First of all, if there are substantive charges which can be proved, it is in general undesirable to complicate and to lengthen matters by adding a charge of conspiracy. Secondly, it can work injustice because it means that evidence which otherwise would be inadmissible on the substantive charges against certain people becomes admissible. Thirdly, it adds to the length and complexity of the case so that the trial may easily be wellnigh unworkable, and impose a quite intolerable strain both on the court and on the jury."

the other defendants, purchased goods from the Stracuzzas. There were three separate series of transactions. Clearly this would not permit a joinder of the defendants.

The Government is aware of this, although its brief does not always keep the distinction sharply in focus. To say that each of the defendants participated in a series of transactions is true enough. To say that the participants in a series of transactions can be joined under Rule 8(b) is also true enough. These two propositions, artfully combined, may create the illusion that joinder was proper in this case. The real question, however, is whether *all* of the defendants participated in the *same* series of transactions. Only in this circumstance would joinder be proper.

Carefully read, the Government's brief does face up to this requirement. Every one of the cases cited by the Government to show proper joinder in "analogous circumstances" (Gov't Br. 34-35) involved defendants[3] who had in fact participated in the same series of acts or transac-

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3. In *United States v. Rosenfeld*, 235 F. 2d 544 (C. A. 7), certiorari denied, 352 U. S. 928, graphically cited by the Government as a case authorizing joinder in circumstances "analogous" the Government in its brief in opposition (Oct. T. 1956, No. 488) at pages 9 and 10 there stated:

> "Here the indictment and the trial record clearly indicate that the offenses and the defendants were linked in a logical series of interrelated transactions which could properly be joined under the rule. Thus, both transactions involved salesmen of the Consolidated Home Improvement Company of Evansville, Indiana; both involved a strikingly parallel pattern of conduct *i.e.*, the 'model home' and 'bonus' technique; the overt acts charged were essentially similar; Cutler played the same role in each transaction; and evidence of past activity revealed like transactions involving Cutler and these and other salesmen. (See Statement, *supra*, pp. 4-8.)
>
> In totality, the transactions appear as related threads of a common all pervading plan. Indeed, petitioner and all the co-defendants could reasonably have been named in one general conspiracy count for the individual salesmen, '[b]y their separate agreements, if such they were, * * * became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by

tions. The Government has devoted 18 pages of its brief to a point of law which is obvious on the face of Rule 8(b). Even a brief of 180 pages with ten times as many cases would not make this basis for joinder of defendants applicable to this case.

In the teeth of the facts, however, the Government blandly asserts that all of these defendants participated in a single series of transactions. Not a word is said of the indisputable fact that the District Court dismissed the conspiracy count because there was not a shred of evidence to connect any of the defendants with the others. There is nothing in the record to show that any defendant knew of the Stracuzzas' dealings with the other defendants. *Not one citation* is given to a page in the record where one might look for evidence that all of the defendants took part in the same series of transactions.[4]

In contrast to the assertion of the Government that all of the defendants were participants in a single enterprise, there is the following description of the case in the opinion of the Court of Appeals:

> "There was only one witness common to all defendants, Tony Stracuzza, and he gave his testimony in orderly fashion describing his business and then his relationship and his transactions with each defendant

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their common single goal.' *Blumenthal v. United States*, 332 U. S. 539, 558. That the defendants were instead charged in separate conspiracy counts could have worked only to petitioner's benefit."

The other cases cited by the Government are just as "analogous" as this one.

4. Oddly enough, in another section of the Government brief it is argued that "with virtually every offer of proof, testimony or exhibit, an instruction was requested and obtained that proof admitted with respect to one defendant was not to be considered with respect to any other defendant" (Gov't Br. 41). The Government especially stresses how easily separated was the evidence as to each defendant. This is entirely inconsistent with the situation where defendants are properly joined; there would be "relevancy or dependency of the proof" relating to defendants properly joined (Gov't Br. 17, 32).

in turn. Each defendant lived in a different part of the East, except the Schaffers who operated their store together; and *there is nothing in the record to indicate that any one of them knew of Stracuzza's dealings with the others.*" (R. 114) (Emphasis added.)

All the Government says is that the indictment *alleged* that the three defendants took part in the same series of transactions. "We think it clear that the substantive counts did *allege* a (i.e., one) series of transactions" (Gov't Br. 33) (Emphasis added).[5] The argument seems to be that if joint participation in a single enterprise is alleged, it is a matter of no consequence that there is a total failure of any evidence to support the allegation.

This brings us full circle back to the issue posed by the conspiracy theory of joinder. From petitioners' standpoint, it makes no difference what fictional allegation is employed to deprive them of their fundamental rights—whether it be a flimsy allegation of a conspiracy or an equally flimsy allegation of participation in the same series of transactions. The same question is posed in either situation: can a mass trial be made possible by use of a fiction?

If the Government chooses to stand on its new theory of joinder, however, there is no need to reach the problem of the fictional allegation as a basis for joinder. Despite the Government's assertion, it is not even arguable that the indictment in this case (R. 5a-7a) charges in the substantive counts that all of the defendants participated in the same series of transactions. Each count is complete and integrated in itself. There are no cross references. The acts described in each count are manifestly different from the acts in the other counts. While it is true that the Stra-

5. Similar assertions are found on page 17 of the Government Brief. The Government also states: "Each defendant was a part, even though separate, of a scheme which had a common center . . ." (Gov't Br. 37). This assertion, which purports to describe proved facts rather than the allegations in the indictment, is entirely lacking in support in the record. The Government, of course, cites nothing to substantiate it.

cuzzas are named as co-defendants in each of the substantive counts, that is more consistent with three unrelated series of transactions than it is with one single series. If the presence of one co-defendant in each of three otherwise unrelated indictments is enough to constitute an allegation that all the indictments charge a single transaction, then words have lost all meaning.

Under the conspiracy theory of joinder, there was *at least an allegation* that the defendants *participated* in a common enterprise. Its fundamental weakness was the lack of any evidence to support the charge. The Government's new theory, equally lacking in any basis in fact, does not even have the dubious merit of resting upon any allegation at all. Neither theory justifies the mass trial of three separate and unrelated defendants.

In *Stirone v. United States*, 361 U. S. 212, decided by this Court on January 11, 1960, appears the following significant passage: "The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." The Government is now trying, in effect, to add something to the indictment which does not appear there now. Only the grand jury, which is a part of the judiciary, not the Government, which is a part of the executive department, can add anything to an indictment.

C. The Government continues to assert that, even if the defendants were not properly joined, they would not be entitled to reversal in the absence of a showing of prejudice. The Government failed, however, to call the attention of this Court to a recent decision of the Fourth Circuit which is directly contrary to its argument.

In *Ingram v. United States*, 272 F. 2d 567, the Government made the same argument it is now presenting to this Court. Chief Judge Sobeloff, former Solicitor General, spoke for the Fourth Circuit in categorically rejecting the Government contention. Fed. R. Crim. P. 14, which requires

a showing of specific prejudice to justify a severance or separate trials, was held to apply only to cases where joinder is proper under Rule 8. If joinder is not proper under Rule 8, relief is not conditional upon proof of prejudice.

> "In other words, where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief." *Id.* at 570.

The factual situation in *Ingram* is strikingly similar to the instant case. On the face of the indictments, there was a basis for joinder. When the evidence was received, however, the lack of connection between the offenses and the defendants was apparent. The Fourth Circuit held that it was error not to grant a new trial.

This decision is highly relevant to the instant case in several ways. As already said, it *squarely contradicts* the argument by the Government that petitioners are entitled to relief only if specific prejudice be demonstrated.[6] It is also inconsistent with the Government's argument that propriety of joinder is determined solely on the allegations in the indictment, without regard to whether any evidence supports the allegation. As in this case, there was no evidence in *Ingram* to support the allegations on which joinder rested. The Fourth Circuit held that relief must be granted.[7]

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6. Petitioners, in arguing that specific prejudice need not be shown, do not withdraw their contention that this record is replete with evidence of actual prejudice. See the main brief at pages 23 to 35.

7. It is difficult and truly disturbing to understand why petitioners must call to the attention of the Solicitor General a case so obviously important to the case now before the Court. The Fourth Circuit decision had not been published when petitioners filed their main brief. But the *Ingram* decision has been known to the Government, a party to that case, since November 5, 1959, when it was decided. While the opinion was not published until February 1, 1960, the Government brief cited, on another issue, a case published a week later. *Griffin v. United States*, 272 F. 2d 801.

D. The Government has grossly misstated the procedural setting in which the issue of improper joinder arises. It is stated flatly, and in italics, that petitioners sought a judgment of acquittal, "a judgment that they go free, not that each have a new trial separately" (Gov't Br. 22). There is nothing in the record to support that statement. It is obviously erroneous.

At the close of the prosecution evidence, the District Court heard argument of counsel. Direction of the hearing was assumed by the trial judge, who expressed special concern with the conspiracy counts (R. 11a). After hearing the Government's counsel, the Court said: "Well, I assume that all defendants move to dismiss all of the various counts in both indictments, at least for their first motion" (R. 11a), and proceeded to grant the motion with respect to both conspiracy counts.

When the discussion turned to the issue of a mass trial, the same informal procedure continued. No specific motion was made. Certainly no request was made for a judgment of acquittal on the ground of improper joinder. Counsel for the defendants argued that the defendants were seriously prejudiced by the joint trial. Counsel cited the *Cannella* case, *Canella v. United States*, 157 F. 2d 470 (C. A. 9, 1946), in which the relief of a new trial was sought. The District Court indicated that it was familiar with the case, but that it believed no relief was warranted other than cautionary instructions to the jury. Moreover, the Court of Appeals considered this very question on its merit.

At all subsequent stages, petitioners have sought only to receive a fair trial as the appropriate relief from the mass trial to which they have been subjected. The closing paragraph in the Schaffers' brief in the Court of Appeals said:

"Consequently even if the indictment is not dismissed for failure of proof of value, as we believe it should be, there must be a new trial because of the prejudice to the appellants Schaffer in being put on

trial together with two individuals with whom they were not shown to have any connection." (Brief 19)

In the petition for rehearing by the Schaffers, it was reiterated that the relief sought for improper joinder was "separate trials" (Pet. 10). In the Petition for Certiorari, we said: "All that was necessary to protect petitioners was a severance of the trial when the conspiracy count was dismissed" (Pet. 12).

In sum, at no time did the defendants ever suggest that they were entitled to an acquittal, "a judgment that they go free, not that each have a new trial separately," on the ground of improper joinder. The Government's assertion that they did is clearly erroneous.

II.

Not only has the Government repudiated the Court of Appeals' theory for justifying a mass trial, it has also repudiated the second half of the Second Circuit decision on whether the jurisdictional amount was proved in this case. Transportation of stolen goods in interstate commerce is a federal crime only if the value of the goods exceeded $5,000. Congress has provided that values of several shipments may be aggregated under certain circumstances. The petition for certiorari raised the dual questions of what factual circumstances would permit such aggregation and how the necessary facts will be found in a particular case.

The Second Circuit held that aggregation would be proper if the shipments were made according to a prearranged agreement giving them unity for purpose of the statute. With this statement of the standard, petitioners have no quarrel. Petitioners disagreed with the Second Circuit, not on its interpretation of the standard, but on its application of the standard to their case. The application requires that there be a finding of facts. Fact finding is a jury function. The jury in this case had not been allowed

to consider precisely the same factual question which the Second Circuit undertook to decide. Fact finding in a criminal case by an appellate court is a manifest violation of this Court's decision in *Grunewald v. United States*, 353 U. S. 391.

The Government now urges that the findings of the Court of Appeals are "unnecessary to sustain the conviction" (Gov't Br. 51). Thus they attempt to sweep under the rug the issue of whether the Second Circuit disobeyed this Court's ruling in *Grunewald*. But what does the Government offer in place of the Court of Appeals' rationale? Exactly the same thing!.

We are told that the several shipments were made according to a "pre-arranged agreement" which contemplated "continuous shipments, at specified discounts, of specified types of goods" (Gov't Br. 50). The Court of Appeals, at the Government's urging, made precisely these findings of fact. Now, while repudiating the Court of Appeals' "findings", the Government is *trying to induce* this Court to make the same findings of fact.

The Government pretends that the fact that several shipments were properly joined in one count indicates that they had unity of purpose. Repeatedly it is stressed that the inclusion of several shipments into a single count was never attacked as duplicitous. Therefore, according to the Government, the several shipments must have been related.

The Government must acknowledge that joinder of offenses is proper, under Fed. R. Crim. P. 8(a), if they are *similar*. Shipments which are entirely separate and unrelated may nonetheless be similar. Petitioners would not for a minute claim that the shipments in this case were not similar. They would therefore be properly joined. To attack a count so joining them as duplicitous would have been a waste of time. That the shipments were similar, were properly joined, were not attacked as duplicitous, does not prove that the shipments were related or had unity of purpose, as the Government claims.

The Government's argument is a violation of the most elementary rule of logic. Because all horses are animals does not prove that all animals are horses. Because related offenses may be properly joined in one count does not prove that all offenses joined are related.[8]

The Government is not willing to take the position that any time joinder would be permitted by Rule 8 offenses may be aggregated to make up the $5,000. "Considering the present liberality of rules for joinder, such a literal reading of the statute would go very far" (Gov't Br. 46). The Government concedes that the "evident" purpose of the provision for aggregation was ". . . . to make certain that a violator would not be able to be free of federal control by taking advantage of the $5,000 minimum as to shipment" (Gov't Br. 49). Nothing could more obviously point to rejection of the view that entirely separate and unconnected shipments may be aggregated. The breaking up of a larger shipment into segments worth less than $5,000 necessarily leaves each shipment part of a general plan or scheme.

As the Government admits, ". . . . there could be many factual patterns which would amount to a 'series' of transactions" (Gov't Br. 49 n.8). The important words are "factual patterns." This is precisely what petitioners have contended throughout the trial. Whether such a factual pattern exists in this case is, obviously enough, a question of fact for the jury to determine.

The "factual pattern" which the Government purports to see in this case is ". . . . proof that the shipments were made according to a pre-arranged agreement between the Stracuzzas and each of the petitioners—which contemplated continuous shipments, at specified discounts, of speci-

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8. The Government's purported distinction between joinder of several acts in one count and joinder of several counts is really ingenuous (Gov't Br. 49). Every count must specify a complete offense. In any circumstance where the prosecution must aggregate shipments in order to show the jurisdictional amount, it will be impossible to charge the separate shipments in separate counts. The individual counts would lack the necessary $5,000 value.

fied types of goods" (Gov't Br. 50). Petitioners vehemently disagree with this characterization of the facts,[9] but the vital point is that the issue is one of fact.

At the Government's behest, petitioners were deprived of a jury trial on that issue of fact. At the Government's behest, the Court of Appeals improperly made a finding on that issue of fact. Now, this Court is urged by the Government to make exactly the same finding of fact.

That the Government has not shifted from the position it urged upon the Court of Appeals is made clear in the following extract from its brief in this Court:

> "We read the reference to this fact in the opinion below as merely spelling out that closeness of relationship that, without question, gave the shipments unity of purposes for the statute. Its opinion represents no improper fact-finding (Pet. Br. No. 111, p. 35), or departure from the theory of conviction (Pet. Br. No. 111, p. 40), as alleged by petioners" (Gov't Br. 50 n.9).

What the distinction is between "merely spelling out" and "fact-finding" does not appear from this exercise in sophistry. To say that the matter is "without question" is totally false.

* * *

The Government, for reasons which do not authoritatively appear, has unceremoniously "ditched" the decision of the Court of Appeals. The most likely inference is that the lower court's decision could not, with integrity, be defended. In place of the Court of Appeals' rationale, the Government has offered arguments which it labels as new and different. Only the labels have changed. The same defects are found below the thin veneer applied by the Government.

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9. See our main brief at page 38, n. 11. Cf. 136 A. L. R. 943.

It is respectfully submitted that it is now even mo
clear that the judgment of the lower court should be
versed.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.
Counsel for the Petitione

IRVING W. COLEMAN,
1820 Main Street,
Northampton, Pa.,
Of Counsel.

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